Supreme Court, U.S.
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In the

Supreme Court of the United States

JAMES J. HAYES, on behalf of himself and all others similarly situated, and THOMAS BOOTS, on behalf of himself and all others similarly situated,

Petitioners,

- v. -

CROWN CENTRAL LLC, MICHAEL F. DACEY, STANLEY A. HOFFBERGER, BARRY L. MILLER, FRANK B. ROSENBERG, HENRY A. ROSENBERG, JR., JOHN E. WHEELER, JR., JACK AFRICK, HAROLD RIDLEY, CREDIT SUISSE FIRST BOSTON CORPORATION and ROSEMORE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Should an attorney's negligence, which (i) does not prejudice the opposing party, (ii) does not cause any delay in the judicial proceedings and (iii) does not show any bad faith, be considered "excusable neglect" for purposes of extending the time to file a notice of appeal pursuant to FRAP 4(a)(5), as five circuits have held, or should an attorney's negligence never be considered excusable, as six circuits have held?

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PETITION FOR WRIT OF CERTIORARI

Petitioners James J. Hayes, on behalf of himself and all other similarly situated, and Thomas Boots, on behalf of himself and all others similarly situated, respectfully request that this Court grant their petition for writ of certiorari to review the judgment below of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished Order of the Court of Appeals dated June 28, 2005 denying the timely petition for rehearing en banc appears at page A-1 in the appendix to this petition ("Appendix"). The opinion of the Court of Appeals dated May 11, 2005 affirming the District Court is not published and appears at page A-4 in the Appendix. The unpublished Order of the District Court dated May 25, 2004 adopted by the Court of Appeals as its opinion appears at page A-6 of the Appendix.

JURISDICTION

The Court of Appeals entered judgment on May 11, 2005, and denied a timely petition for rehearing en banc on June 28, 2005. The Court of Appeals issued its mandate on July 6, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves Rule 4(a)(5) of the Rules of Appellate Procedure which provides as follows:

"(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) A party so moves no later than 30 days after the time prescribed by this Rule 4 expires; and

(ii) Regardless of whether its motion is filed before or during the 30 days after the time prescribed by

this Rule 4 expires, that party shows excusable neglect or good cause."

STATEMENT OF THE CASE

This case arises out of a "going private" or cash-out merger pursuant to which the public stockholders of Crown Central Petroleum Corporation ("Crown") were forced to surrender their common stock to Crown in exchange for $10.50 per share in cash. The petitioners are former stockholders of Crown who brought a class action on behalf of its public stockholders alleging that the respondents issued a proxy statement containing fairness opinions which were objectively and subjectively false in violation of § 14(a) of the Securities and Exchange Act of 1934 and Rule 14a-9 issued by the Securities and Exchange Commission, and breached fiduciary duties owed to public stockholders.

Subject matter jurisdiction existed in the District Court pursuant to 28 U.S.C. §§ 1331, 1337 and 1367 because the claims were brought pursuant to §§ 14(a) and 20(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78n(a) and 78t(a) and Rule 14a-9, 17 C.F.R. § 240.14a-9. Subject matter jurisdiction existed in the Court of Appeals pursuant to 28 U.S.C. § 1291 because it was an appeal from a final judgment that was entered on May 25, 2004, and the notice of appeal was filed on June 4, 2004.

On October 17, 2003, the Court of Appeals, in an unpublished per curiam opinion, vacated in part the judgment of the District Court for the Eastern District of Virginia at Alexandria, and remanded certain federal securities law claims of petitioners for consideration by the District Court. Hayes v. Crown Central Petroleum Corp., 78 Fed. Appx. 857 (4th Cir. 2003). After remand to the District Court, the respondents filed motions to dismiss such claims. A hearing was held on December 19, 2003 on the motions of the respondents to dismiss the claims which had been remanded to the District Court. At such hearing the District Court took the motions to dismiss under advisement after hearing oral argument by the parties.

By an order dated February 9, 2004 ("Order"), the District Court granted the motions to dismiss the claims, the Order was entered in the docket on February 12, 2004 and the case was closed on that date. The clerk of the District Court mailed a copy of the Order of February 9, 2004 to petitioners' local counsel, Timothy D. Battin, at the law firm of Straus & Boies, LLP, 10513 Braddock Road, Fairfax, Virginia 22032 in accordance with a local rule of the District Court providing that service of court orders would be made only on local counsel. The clerk of the District Court did not send a copy of the Order dated February 9, 2004 to lead, out-of-state counsel Edward Selfe in Birmingham, Alabama. Although Mr. Battin had instituted procedures to send all court orders or correspondence to Mr. Selfe immediately upon the receipt by Mr. Battin, due to an administrative mistake in the offices of Straus & Boies in Fairfax, Virginia, a copy of the Order of February 9, 2004 dismissing the case was not sent to lead counsel Edward Selfe in Birmingham, Alabama who handled all communications with the petitioners.

On March 30, 2004 Mr. Selfe discovered that the case had been dismissed by the Order dated February 9, 2004 and entered in the docket on February 12, 2004. Mr. Selfe immediately contacted the petitioners, and on April 5, 2004 petitioners filed a motion in the District Court for an extension of time to file a notice of appeal from the Order of February 9, 2004 dismissing the case. This motion was filed pursuant to Rule 4(a)(5) of the Rules of Appellate Procedure ("FRAP"). Pursuant to a May 15, 2002 scheduling order in this case in the District Court, the motions clerk of the District Court assigned the motion to Magistrate Judge Poretz as a non-dispositive matter for hearing on April 16, 2004.

At the hearing on April 16, 2004, after reviewing petitioners' memorandum and affidavit in support of their motion for extension, respondents' opposition to the motion for extension, and petitioners' reply, as well as receiving oral argument from both sides, the Magistrate Judge asked counsel for the respondents three questions:

> THE COURT: Let me just ask counsel a couple of questions.

Do you argue that there is a danger of prejudice to any of the Defendants if I grant the motion?

MS. EDWARDS: No, Your Honor. The prejudice in this case comes simply from not having finality, but that doesn't rise to the level of some independent prejudice, no.

THE COURT: Do you argue that the length of the delay and its potential impact on judicial proceedings is significant?

MS. EDWARDS: No, Your Honor.

THE COURT: Do you argue whether the filing o this motion was in good faith or not in good faith?

MS. EDWARDS: No, Your Honor.

An excerpt from the transcript of the April 16, 2004 hearing appears at p. A-9 of the Appendix. The Magistrate Judge found petitioners' reason was excusable, stating, "this series of events unfortunately happens in the practice of law," and therefore, "when I consider all the circumstances, I'm going to find under all the circumstances that it was excusable as it exists right here." *See* Appendix at p. A-10.

Respondents filed objections to the Magistrate Judge's order granting the extension of time to file a notice of appeal. The Chief Judge of the District Court performed a de novo review of the order of the Magistrate Judge granting the extension of time to file a notice of appeal. After reviewing memoranda of the parties and without a hearing, the Chief Judge vacated the Magistrate Judge's order and issued an Order dated May 25, 2004 denying petitioners' motion for an extension of time to file a notice of appeal. On June 4, 2004 petitioners filed a notice of appeal in the District Court from the Chief Judge's Order of May 25, 2004.

In an opinion dated May 11, 2005, the Court of Appeals concluded that the District Court had applied the correct standard of review of the Magistrate's order and that the District Court did not abuse its discretion in finding that petitioners failed to demonstrate excusable neglect warranting an extension of time to file the notice of appeal. The Court of Appeals affirmed the District Court for the reasons stated by the District Court in its Order dated May 25, 2004 which appears at page A-6 of the Appendix.

REASONS FOR GRANTING THE PETITION

Before this Court's ruling in Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380 (1993), the courts of appeals were divided on how to interpret the phrase "excusable neglect," which appears in many statutes and rules as a basis for relief from a filing a deadline. Some courts of appeals limited recognition of "excusable neglect" to cases in which the party seeking the extension was impeded by circumstances beyond its control. Other courts of appeals were willing to excuse delays in good faith and had not prejudiced the opposing parties or hampered the administration of the court. See Id. at 387 n. 3 (outlining the split).

In Pioneer, this Court repudiated the former, hard-line approach. "[T]he 'excusable neglect' standard," this Court held, "is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer." 507 U.S. at 391. The approach instead should be "an equitable one, taking account of all relevant circumstances surrounding the party's omission." Id. at 395. These circumstances include

(1) "the danger of prejudice to the debtor";

(2) "the length of the delay and its potential impact on judicial proceedings";

(3) "the reason for the delay, including whether it was within the reasonable control of the movant"; and

(4) *"whether the movant acted in good faith."*

Id.

Since Pioneer, the courts of appeals give the impression of having fallen into line, at least to the extent of giving lip service to the Pioneer multi-factor test. Invariably, when a court of appeals confronts a claim of excusable neglect, it dutifully recites the four Pioneer factors before rendering a decision on whether to grant the requested extension. This superficial agreement, however, masks a continuing, philosophical conflict over which kinds of delays may constitute "excusable neglect."

Several courts of appeals – most particularly the Second and the Fourth – continue to take the pre-Pioneer hard-line approach that an attorney's neglect is never excusable. Other courts of appeals – including the Third, Ninth, and Eleventh – take what might be termed a "no harm, no foul" approach, granting the extension when the delay is the result of simple negligence and the prejudice to opposing parties and to the courts is negligible.

This conflict cannot be swept away as the natural consequence of applying a multi-factored balancing test to varying sets of facts. While some cases are unquestionably unique, most cases applying the Pioneer test, including this one, arise from the following set of facts:

- the moving party or its attorney acts negligently – not recklessly or in bad faith – and misses the filing deadline;

- the moving party recognizes its mistake within days of missing the deadline and immediately requests an extension;

- neither the opposing party nor the court would be harmed by the extension; and

> no other relevant circumstances bear upon the district court's determination whether to grant the extension.

Despite these commonalities, the courts of appeals continue to reach diametrically opposite results.

This case thus merits certiorari review for several reasons.

First, as indicated, the decision of the Fourth Circuit below is part of a clear and deep split an ng the courts of appeals on how to apply the "excusable neglect" standard to a commonly recurring set of facts.

Second, this case presents an issue that arises often and is of critical importance to federal litigants and to the federal courts. As detailed below, the term "excusable neglect" appears in at least two federal statutes and ten federal rules of procedure. According to WestLaw's online KeyCite service, over 1500 cases have cited Pioneer since its issuance – an average of once every three days.

Third, the circuit split arises at least in part from uncertainty over how to interpret conflicting dicta from this Court's Pioneer decision. The hard-line circuits lay emphasis on this Court's statement that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." 507 U.S. at 392. The "no-harm, no foul" circuits lay emphasis on this Court's statement that "the lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim." 507 U.S. at 397-98. These two statements cut directly against each other in cases such as this one. Clarification of which should prevail is needed.

Fourth and finally, this case presents the issue in the cleanest possible fashion. The district court found, and the Fourth Circuit accepted, that petitioners missed the initial appeal deadline through "simple oversight." The district court also found, and the Fourth Circuit accepted, that neither the opposing parties nor the

courts would be hurt by an extension. Respondents do not contest any of these findings and indeed conceded them at the motion hearing. In short, this case does not present any factual disputes, only a dispute about how to apply the "excusable neglect" standard to a commonly recurring set of facts. It is an ideal vehicle for this Court to clarify the issue.

(1) The Circuits are in Sharp Conflict Concerning an Attorney's Harmless Neglect with Five Circuits Finding it Excusable and Six Circuits Finding it Not Excusable

There is a sharp conflict in decisions of the Courts of Appeals interpreting Pioneer. The Third, Seventh, Ninth, Eleventh and D.C. Circuits have interpreted Pioneer to mean that an attorney's neglect is excusable if it is harmless, i.e., if there is no prejudice to the opposing party, no delay in the proceedings and no lack of good faith. The First, Second, Fourth, Sixth, Eighth and Tenth Circuits have interpreted Pioneer to mean that an attorney's neglect is not excusable even though there is no prejudice, no delay and no bad faith.

Those Courts of Appeals that hold that an attorney's neglect, even though harmless, can never be excused rely on the statement in Pioneer that ". . . inadvertence, ignorance of the rules or mistakes construing the rules do not usually constitute excusable neglect . . ." 507 U.S. at 391-2, 123 L. Ed. 2d at 86-7. In taking its self-described "hard line" on an attorney's neglect, the Second Circuit relied on the foregoing statement in Pioneer. Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 369 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004). Other circuits have followed Silivanch, e.g., United States v. Torres, 372 F.3d 1159, 1163 (10th Cir. 2004). In Enron, the Second Circuit pointed out that the Ninth Circuit had reached a different conclusion in Pincay v. Andrews, 389 F.3d 853 (2004), cert. denied, 125 S. Ct. 1726 (2005), by affirming a trial court's decision to allow a late filed notice of appeal arising from a paralegal's misreading of the rule governing notices of appeal. 2005 WL 1950271 at p. 5.

In the Enron case decided on August 16, 2005, the Second Circuit, quoting the First Circuit, stated that ". . . The four Pioneer factors do not carry equal weight; the excuse given for the late filing must have the greatest import." 2005 WL 1950271 (2d Cir. 8-16-05). The "hard line" circuits pay lip service to the four Pioneer factors but in fact they focus solely on the attorney's neglect. The "soft line" circuits do in fact give effect to the equitable factors of no prejudice, no delay and no bad faith.

Those Courts of Appeals that have applied a more equitable interpretation of excusable neglect rely on the statement in Pioneer that ". . . the lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim." 507 U.S. at 398, 123 L. Ed. 2d at 91. The Third, Seventh, Ninth, Eleventh and D.C. Circuits have relied on the forgoing statement in Pioneer to hold that an attorney's neglect is excusable if there is no prejudice, no delay and no bad faith.

In the Ninth Circuit's 2004 en banc decision in Pincay v. Andrews, supra, interpreting Pioneer, the Court of Appeals said:

> Our circuit's confusion is not isolated. The authorities interpreting Pioneer in a number of circuits are in some disarray. In fact, the confusion begins with Pioneer itself, and various subsequent circuit opinions have cited similar portions of Pioneer to support their respective but differing conclusions.

(a) The circuits holding that an attorney's neglect is excusable if there is no prejudice, no delay and no bad faith are as follows:

Third Circuit

In George Harms Constr. Co., Inc. v. Chao, 371 F.3d 156, 164 (3d Cir. 2004), the Third Circuit stated in 2004 that in determining whether there is excusable neglect ". . . the 'control'

factor does not necessarily trump all other relevant factors" and said:

> . . . As the Commission has recognized, in Fed. R. Civ. P. 60(b)(1) late filing cases it is usually a given that there is a lack of prejudice to the secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer. . . . But just because those factors may nearly always favor the petitioner does not mean that the Commission should ignore them. (Emphasis added)

371 F.3d at 164.

In the case of In re Orthopedic Bone Screw Products Liability Litigation, 246 F.3d 315 (3d Cir. 2001), the District Court for the Eastern District of Pennsylvania dismissed a late filed claim for compensation in a multi-district class action settlement. On appeal, the Third Circuit reversed the District Court, holding that:

> By focusing on whether the person's injury prohibited the timely filing of his or her claim, the court's considerations turned wholly on whether the claimant's failure to file a claim by May 15, 1997 was due to medical circumstances beyond the control of the claimant, and not on other equitable considerations such as the prejudice to other claimants or potential effect on judicial proceedings. . . . By making the medical status of the claimants in May of 1997 dispositive of their excusable neglect claims, the court misapplied the holding of Pioneer that excusable neglect is an elastic concept and is not limited strictly to omissions caused by circumstances beyond the control of the movants. . . . Failing to inquire beyond the health status of the claimant in determining the reason for the delay was error.

246 F.3d at 328-9.

Seventh Circuit

In Michele A. Robb, et al. v. Norfolk and Western Railway Company, 122 F.3d 354 (7th Cir. 1997), the Seventh Circuit discussed in detail its pre-Pioneer and its post-Pioneer case law, and held that its pre-Pioneer case law which required exceptional circumstances for excusable neglect was changed by this Court's decision in Pioneer. In reaching that conclusion the Seventh Circuit stated:

> All Article III Courts, including this one, are bound to follow the holdings of our Nation's highest court, including its interpretation of "excusable neglect" in Rule 60(b)(1). See United States v. Gillipsie, 974 F.2d 796, 804 (7th Cir. 1992) ("Our obligation is to follow Supreme Court precedent, not contract or expand it. . ."); Bae v. Peters, 950 F.2d 469, 478 (7th Cir. 1991) ("If there is a conflict between this circuit precedent and a Supreme Court precedent, we are bound to follow the Supreme Court")." 122 F.3d at 361. The Seventh Circuit stated that "excusable neglect" had a new and broader meaning in the aftermath of Pioneer.

122 F.3d at 361-2.

In United States v. Brown, 133 F.3d 993 (7th Cir. 1998), the Seventh Circuit affirmed a district court's finding of excusable neglect arising out of an attorney's confusion of state and federal rules and said:

> . . . Pioneer made clear that the standard is a balancing test, meaning that a delay might be excused even where the reasons for the delay are not particularly compelling.

133 F.3d at 997.

In United States v. Coney, 407 F.3d 871 (7th Cir. May 11, 2005), the District Court denied a motion to suppress a wire tap because the sealing of the wire tap had been delayed. In affirming the District Court, the Seventh Circuit said there was neglect in the late sealing of the wire tap, but it was harmless and therefore, while it was not justifiable, it was excusable, citing Pioneer.

Ninth Circuit

In the case of Pincay v. Andrews, supra, a majority of the judges on the Ninth Circuit voted to rehear a panel decision en banc in order to consider whether the creation of a per se rule that a late filing due to attorney negligence is not excusable is consistent with the decision in Pioneer. The Ninth Circuit en banc held that such a per se rule is not consistent with Pioneer.

Eleventh Circuit

Applying the standard of excusable neglect in FRCP 60(b)(1), the Eleventh Circuit in Cheney v. Anchor Glass Container Corporation, 71 F.3d 848 (11th Cir. 1996), faced a situation in which an associate of the primary attorney for the plaintiff received notice of the entry of an order for which action had to be taken within thirty days or an arbitration award would become final. Id. at 849. The associate, who was leaving town, instructed his secretary to inform the primary attorney for the plaintiff of the entry of the order when the primary attorney returned to the office. For whatever reason, the secretary did not do so, and the primary counsel was not informed of the order.

Faced with these circumstances, the Eleventh Circuit found that the "reason for the delayed filing was a failure in communication between the associate attorney and the lead counsel, and that the circumstances of the error were obviously within Counsel's control, but their non-communication and resulting inaction amounts only to an "omission caused by carelessness." Id. at 850. In the absence of proof that counsel deliberately failed to comply with the rules, the lack of prejudice for the other party and evidence that counsel had acted in good faith, the Eleventh Circuit found that the facts "require a finding by

the District Court that the neglect of counsel was "excusable," and that the failure to find that the neglect was excusable constituted an abuse of discretion. Id. at 850.

D.C. Circuit

In Yesudien ex rel. United States v. Howard University, 270 F.3d 969 (D.C. Cir. 2001), the D.C. Circuit held that the negligence of an attorney, who had relied upon local rules rather than the applicable federal rules, was excusable. In the case of In re Vitamins Antitrust Class Actions, 327 F.3d 1207 (D.C. Cir. 2003), the D.C. Circuit rejected the argument that "garden variety inattention can never constitute excusable neglect." Id. at 1209.

(b) The circuits holding that an attorney's neglect is not excusable even though there is no prejudice, no delay and no bad faith are as follows:

First Circuit

In Graphic Communications Int'l Union v. Quebecor Printing, 270 F.3d 1, 5 (1st Cir. 2001), the First Circuit said the reason for the late filing must have the greatest import and held that a late filing due to an attorney's ignorance of an applicable rule was not excusable neglect even though there was no prejudice, no delay and no bad faith.

Second Circuit

In Silivanch v. Celebrity Cruises, Inc., 333 F.3d 1159, 1163-4 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004), the Second Circuit adopted a self-described "hard line" and held that an attorney's neglect was not excusable even though there was no prejudice, no delay and no bad faith.

Fourth Circuit

In Thompson v. E.I. Dupont de Nemours & Co., 76 F.3d 530 (4th Cir. 1996), the Fourth Circuit held that an attorney's use of the U.S. mail to file a notice of appeal which was late due to the mail was not excusable.

Sixth Circuit

In McCurry v. Adventist Health Systems, 298 F.3d 586, 595 (6th Cir. 2002), the Sixth Circuit , in a case under Rule 60(b)(1), held that an attorney's error in misreading applicable law is not excusable neglect.

Eighth Circuit

In Lowery v. McDonnell Douglas Corp., 211 F.3d 457 (8th Cir. 2000), cert. denied, 531 U.S. 929 (2000), an attorney miscalculated the 30-day period within which to file a notice of appeal. The Eighth Circuit held that the attorney's error was not excusable even though there was no prejudice, no delay and no bad faith.

Tenth Circuit

In U.S. v. Torres, 372 F.3d 1159 (10th Cir. 2004), the Tenth Circuit held that an attorney's misinterpretation of an unambiguous rule cannot be excused under Rule 4(b)(4) of the Federal Rules of Appellate Procedure, citing the Second Circuit decision in Silivanch.

(2) The Question of When an Attorney's Neglect in Complying with Federal Procedural Rules is Excusable is a Constantly Recurring One and is Important

During the 12-year period from this Court's 1993 decision in Pioneer Investments v. Brunswick, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), there have been more than 1,470 cases in the federal courts citing Pioneer according to Westlaw Keycite references. That is an average of 120 cases per year or about one case every three calendar days. During the period from January 1, 2005 through August 30, 2005 there were more than 120 decisions in the federal courts citing Pioneer. This is an average of a case every other business day. As recently as August 16, 2005, the Second Circuit decided a case, In re Enron Corp.,

2005 WL 1950271, in which it analyzed in detail the meaning of excusable neglect as set forth by this Court in Pioneer.

The term "excusable neglect" appears in at least two federal statutes and in ten different federal rules of procedure:

(i) 2 U.S.C. § 394(c)(2);

(ii) 28 U.S.C. § 2107(c);

(iii) Federal Rules of Bankruptcy Procedure 7013, 8002(c)(2), 9006(b)(1) and 9033(c);

(iv) Federal Rules of Civil Procedure 6(b)(2), 13(f) and 60(b)(1);

(v) Federal Rules of Criminal Procedure 4(b)(1)(B);

(vi) Federal Rules of Appellate Procedure 4(a)(5) and 4(b)(4).

This Court has held that its Pioneer decision applies to all the rules in which the term "excusable neglect" appears. Stutson v. United States, 516 U.S. 193, 116 S. Ct. 600, 133 L. Ed. 2d 571 (1996). The question of when an attorney's neglect resulting in a late filing is excusable under the federal rules is a constantly recurring one.

(3) This is a Case Requiring Clarification of an Earlier Decision and is Not a Case of the Misapplication of a Properly Stated Rule of Law

The sharp conflict in the decisions of the Courts of Appeals over the meaning of the term "excusable neglect" is not because of the variety of different circumstances in which the issue of excusable neglect arises. Rather, the conflict is due to the different statements made in Pioneer with respect to the concept of excusable neglect. On the one hand, it is stated in Pioneer that:

> Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that excusable neglect under Rule 6(b) is a somewhat "elastic concept. . . ." 507 U.S. at 392, 123 L. Ed. 2d at 87.

Relying upon the foregoing statement in Pioneer, the Second Circuit and other Circuits have adopted a "hard line" that an attorney's neglect, though harmless, is never excusable.

On the other hand, it is stated in Pioneer that:

> As the Court of Appeals found, the lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim." 507 U.S. at 397-8, 123 L. Ed. 2d at 91.

It is also stated in Pioneer that:

> . . . to exclude every instance of an inadvertent or negligent omission would ignore the most natural meaning of the word "neglect". 507 U.S. at 394-5, 123 L. Ed. 2d 89.

It is further stated in Pioneer that:

> Thus, at least for purposes of Rule 60(b) "excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. 507 U.S. at 394, 123 L. Ed. 2d 89.

Relying upon the foregoing statements, five of the Circuits have refused to adopt a rigid per se rule that an attorney's neglect, though harmless, is never excusable.

In the Ninth Circuit's 2004 en banc decision in Pincay v. Andrews, supra, interpreting Pioneer, the Court of Appeals said:

> Our circuit's confusion is not isolated. The authorities interpreting Pioneer in a number of circuits are in some disarray. In fact, the confusion begins with Pioneer itself, and various subsequent circuit opinions have cited similar portions of Pioneer to support their respective but differing conclusions.

The different conclusions of the Courts of Appeals with respect to excusable neglect are based upon different interpretations of this Court's decision in Pioneer. This is not a case of the misapplication of a clearly stated rule of law. The Court should grant this petition for certiorari in order to clarify its holding in Pioneer and to state very clearly whether or not an attorney's neglect, though harmless, is excusable for purposes of the various federal rules of procedure.

In Gertz v. Welch, 418 U.S. 323, 325, 945 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), this Court granted certiorari to reconsider a publisher's constitutional privilege against liability for defamation of a private citizen. In Miranda v. Arizona, 384 U.S. 436, 441-2, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), this Court granted certiorari in order further to explore some facets the problems.

(4) The Record in this Case is Clear and Unequivocal that There Was no Prejudice, No Delay and No Bad Faith Enabling the Court to Resolve the Conflict in the Circuits and to Clarify its Earlier Decision in Pioneer

There was a failure of communication through oversight between local counsel and out-of-state lead counsel that caused the late filing of the notice of appeal. There was no prejudice to the respondents, no delay in judicial proceedings and no lack of good faith by petitioners and their counsel. The hearing before the Magistrate Judge makes it clear that there is no dispute in this case about those factors. Based upon the record in this case, this Court can resolve the conflict in the circuits about the meaning of excusable neglect when there is no prejudice, no delay and no bad faith.

In this case, through oversight local counsel failed to notify petitioners and out-of-state lead counsel that the District Court had dismissed the complaint, resulting in a late filing of a notice of appeal and the filing of a motion to excuse such late filing pursuant to FRAP Rule 4(a)(5). The local rule of the District Court provided that the Court would mail its orders only to local counsel even though out-of-state lead counsel were counsel of record and had been appointed by the District Court to represent the class in this class action. Neither the out-of-state lead counsel nor the petitioners received the order dismissing the case. Relying upon the Fourth Circuit's decision in Thompson, the District Court denied the motion to extend the time for filing the notice of appeal on the grounds that the reason for the delay was solely the result of circumstances and conduct totally within the control of petitioners' counsel.

The Court of Appeals below affirmed the decision of the District Court for the reasons stated by the District Court in its Order of May 25, 2004 ("Dismissal Order") overruling the Magistrate Judge (Appendix at p. A-6). In the Dismissal Order, the District Court stated as follows:

> Defendants, before the Magistrate Judge, conceded that three of the factors of the Pioneer test had no significance in the matter; however, the reason for the delay was solely the result of circumstances and conduct totally within the control of plaintiff's counsel. This is a case of simple oversight or failure to communicate and is not extraordinary. (Appendix at p. A-7).

The foregoing language of the District Court, which was adopted by the Court of Appeals, makes it explicitly clear that the District Court denied petitioners' motion for additional time to file a notice of appeal on the grounds that ". . . the reason for the delay was solely the result of circumstances and conduct totally within the control of plaintiff's counsel." There can be no question that the District Court refused to find excusable neglect because the circumstances and conduct were not beyond the control of petitioners' counsel. When the District Court stated that ". . . [t]his

is a case of simple oversight or failure to communicate and is not extraordinary . . ." (emphasis added), it clearly held that excusable neglect requires extraordinary circumstances that are beyond the control of the late filer. The Court of Appeals specifically adopted the District Court's reasoning. (Appendix at p. A-4).

In its Order dismissing the case, the District Court said that "excusable neglect" exists only in "extraordinary cases where injustice would otherwise result," citing the Fourth Circuit's decision in Thompson v. E.I. Dupont De Nemours & Co., 76 F.3d 530, 534 (4th Cir. 1996). In Thompson, the Fourth Circuit held that using the U.S. mail to file a notice of appeal that leads to a late filing is not excusable and established a per se rule that a late filing due to counsel's neglect is never excusable.

In the Dismissal Order, the District Court said the findings of the Magistrate Judge, i.e., that there was no prejudice, no delay in the proceedings and no lack of good faith on the part of the petitioners and their counsel, had no significance. Although all these factors strongly favored the petitioners, the District Court ignored them and held that petitioners' late filing of the notice of appeal was not due to excusable neglect because the delay in filing was solely the result of circumstances and conduct totally within the control of petitioners' counsel, i.e., petitioners' counsel were guilty of "neglect."

The question is not whether there is neglect. Before a person can be guilty of neglect, the ability to do the act must have been within that person's control. Rather, the question is under what circumstances is an attorney's neglect excusable. For "excusable" to have meaning, there must be a circumstance where the failure to do that which was within one's control is later found by a court to be excusable. If inadvertence or carelessness is not excusable, what is excusable must be some circumstance beyond the control of the late filer, an argument specifically rejected by this Court in Pioneer.

(5) A Decision by This Court that an Attorney's Neglect is Excusable if There is No Prejudice,

No Delay and No Bad Faith Will Not Burden the Legal System

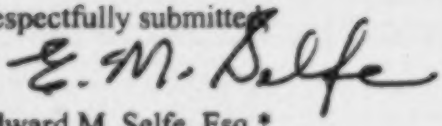
The desire to punish a negligent attorney for a harmless error should never outweigh the legal system's function of fairly resolving disputes. Dismissing cases or appeals because of a negligent but harmless act of an attorney causes the public to lose confidence in the fairness of the legal system. As Judge Posner of the Seventh Circuit said on June 14, 2005 in the case of In re UAL Corporation, 411 F.3d 818, 823 (7th Cir. 2005), "... When an innocent mistake can be rectified without harm to anyone (loss of a windfall is not the kind of harm that a court should endeavor to avert), it should be."

In Enron, the Second Circuit said that the legal system would groan under the weight of a regimen of uncertainty where every missed deadline was the occasion for extensive trial and appellate litigation to determine the equities of enforcing the bar. 2005 WL 1950271 at p. 5. This statement is clearly incorrect because all the circuits have said repeatedly that in almost every late filing case it is clear and without dispute that there is no prejudice, no delay and no bad faith. Excusing attorney neglect when there is no harm will not burden the system because no attorney ever wants to be in the position of having to explain to the client that it is necessary to file a motion for an extension of time to file a document because of the attorney's own negligence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

Order of the Court of Appeals dated June 28, 2005 Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 28, 2005

No. 04-1425
CA-02-122

JAMES J. HAYES, on behalf of himself and all others similarly situated; THOMAS BOOTS, on behalf of himself and all others similarly situated

Plaintiffs – Appellants

v.

CROWN CENTRAL LLC; MICHAEL F. DACEY; STANLEY A. HOFFBERGER; BARRY L. MILLER; HENRY A. ROSENBERG, JR.; FRANK B. ROSENBERG; JOHN E. WHEELER, JR.; JACK AFRICK; HAROLD RIDLEY; CREDIT SUISSE FIRST BOSTON CORPORATION; ROSEMORE, INCORPORATED

Defendants - Appellees

No. 04-1505
CA-02-122-A

JAMES J. HAYES, on behalf of himself and all others similarly situated; THOMAS BOOTS, on behalf of himself and all others similarly situated

Plaintiffs – Appellants

v.

CROWN CENTRAL LLC; MICHAEL F. DACEY; STANLEY A. HOFFBERGER; BARRY L. MILLER; HENRY A. ROSENBERG, JR.; FRANK B. ROSENBERG; JOHN E. WHEELER, JR.; JACK AFRICK; HAROLD RIDLEY; CREDIT SUISSE FIRST BOSTON CORPORATION; ROSEMORE, INCORPORATED

Defendants - Appellees

No. 04-1709 CA-02-122-A

JAMES J. HAYES, on behalf of himself and all others similarly situated; THOMAS BOOTS, on behalf of himself and all others similarly situated

Plaintiffs – Appellants

v.

CROWN CENTRAL LLC; MICHAEL F. DACEY; STANLEY A. HOFFBERGER; BARRY L. MILLER; HENRY A. ROSENBERG, JR.; FRANK B. ROSENBERG; JOHN E. WHEELER, JR.; JACK AFRICK; HAROLD RIDLEY; CREDIT SUISSE FIRST BOSTON CORPORATION; ROSEMORE, INCORPORATED

Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Luttig, Judge Motz, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor

Opinion of the Court of Appeals dated May 11, 2005 Affirming District Court

PER CURIAM:

James Hayes and Thomas Boots ("Appellants") appeal from the district court's orders granting a motion filed pursuant to Fed. R. Civ. P. 12(b)(6) , by Crown Central Petroleum Corp. and its directors, financial advisor, and majority shareholder. ("Appellees") in this civil action alleging violations of the Securities and Exchange Act of 1934 (Nos. 04-1425 and 04-1505). Appellants also appeal from the district court's order rejecting the magistrate judge's decision and denying Appellants' motion to extend the appeal period under Fed. R. App. P. 4(a)(5) (No. 04-1709). We affirm in part and dismiss in part.

In No. 04-1709, Appellants assert that the district court applied an incorrect standard of review when considering the propriety of the magistrate judge's decision and that the court abused its discretion in denying their motion to extend the appeal period. We have thoroughly reviewed the parties' briefs, the joint appendix, and the materials filed by the parties pursuant to Fed. R. App. P. 28(j). We conclude that the district court applied the correct standard of review and did not abuse its discretion in finding that Appellants failed to demonstrate excusable neglect warranting an extension of the appeal period. Accordingly, we affirm for the reasons stated by the district court. See Hayes v. Crown Cent. Petroleum Corp., No. CA-02-122-A (E.D. Va. May 25, 2004).

Turning to the appeals in Nos. 04-1425 and 04-1505, we may now consider Appellees' motion to dismiss these appeals for lack of jurisdiction. We previously deferred action on Appellees' motion pending our consideration of the appeal in No. 04-1709.

Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A) , unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5), or reopens the appeal period

under Fed. R. App. P. 4(a)(6) . This appeal period is "mandatory and jurisdictional." Browder v. Dir., Dep't of Corr., 431 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)).

The district court's judgment granting Appellees' Rule 12(b)(6) motion was entered on the docket on February 12, 2004; the thirty-day appeal period expired on March 15, 2004.[1] The notices of appeal were filed on April 5 and 19, 2004. Because Appellants failed co file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we grant Appellees' motion to dismiss and dismiss the appeals in Nos. 04-1425 and 04-1505 for lack of jurisdiction.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

No. 04-1709 AFFIRMED
Nos. 04-1425 and 04 1505 DISMISSED

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[1] The thirtieth day fell on Saturday, March 13, 2004. Appellants therefore had until Monday, March 15, to timely file a notice of appeal. See Fed. R. App. P. 26(a).

Order of the District Court dated May 25, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JAMES J. HAYES, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02:122-A
CROWN CENTRAL PETROLEUM CORP., et. al.,	)	
Defendants.	)	

ORDER

This matter comes before the Court on Defendants' objections to the Magistrate Judge's April 1 , 2004 order granting Plaintiffs' Motion for Extension of Time to File Notice of Appeal. This Court has performed a de novo review of the matter. See FED. R. CIV. P 72(a).

Rule 4(a)(5) of the Federal Rules of Appellate Procedure requires a party to move for an extension to file a notice of appeal at least within 30 days after the time for filing a notice of appeal has expired. Under Appellate Rule 4(a)(1), Plaintiffs have 30 days to notice appeal after the judgment or order appealed from is entered.

On February 9, 2004, the Court signed its Memorandum Opinion and Order (together the "Dismissal") dismissing Plaintiffs' remaining claim against Defendants. The Dismissal was then docketed by the Clerk on February 12, 2004. Plaintiffs moved for an extension of time to file their notice of appeal on April 5,

2004, well within the time required under Appellate Rule 4(a)(5) for the Court to consider the motion.

Pursuant to the Local Rules, the Clerk's office mailed copies of the Dismissal to Plaintiffs' local counsel. Plaintiffs' local counsel did not inform either Plaintiffs or Plaintiffs' out-of-town counsel about the Dismissal and, as a result, Plaintiffs did not file a timely notice of appeal. The parties do not dispute these facts; however, Defendants assert that Plaintiffs have not shown excusable neglect for the failure to timely file.

In considering a motion to extend time to file a notice of appeal, the Court is required to involve itself in an equitable inquiry, taking account of all relevant circumstances surrounding the party's mistake including:

> the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Thompson v. E.I. Dupont De Nemours & Co., 76 F.3d 530, 533 (4th Cir. 1996), citing Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'Ship, 507 U.S. 380 (1993). "[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." Id. Furthermore, a district Court should find "excusable neglect" only in the "extraordinary cases where injustice would otherwise result." Thompson, 76 F.3d at 534, citing Notes to 1964 Fed. R. Civ. P. 73 (a).

Defendants, before the Magistrate Judge, conceded that three of the factors in the Pioneer test had no significance in the matter; however, the reason for the delay was solely the result of circumstances and conduct totally within the control of Plaintiffs' counsel. This is a case of simple oversight or failure to communicate and is not extraordinary.

Plaintiffs' reason for filing this motion out of time clearly is not due to excusable neglect. While Plaintiffs seek refuge in the Fourth Circuit's decision in Babich v. Cowler, 528 P.2d 293 (4th Cir. 1975), this cannot suffice. In Babich, local counsel received a copy of the order and opinion and neglected to forward copies to the out-of-town counsel because he, the local counsel, believed the Court had sent copies to out-of-town counsel. Id. at 3. The Court found that the mistaken belief was based not only on the fact that local counsel received a carbon copy of the order and opinion but also on the fact that the order stated the following: " [t]he Clerk will send a copy of this memorandum opinion and order to all counsel of record."[2] Id. at 4-5. The Court then found excusable neglect based on this reliance. Id.

No such justification exists in the case at hand. Counsel were aware that copies would be mailed only to local Counsel. The Dismissal did not contain the language relied upon by the Babich Court and the lawyers in that case. Simply put, Plaintiffs offer no reason for this Court to allow the delay. The only reason offered is that Counsel failed to communicate concerning the Dismissal and appeal. For these reasons, it is hereby

ORDERED that the Magistrate Judge's order of April 16, 2004 is VACATED and the Plaintiffs' Motion to Extend Time to File Notice of Appeal is DENIED.

CLAUDE M. HILTON
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
May 25, 2004

[2] Both local and out-of-town counsel were counsel of record.

Excerpt From District Court Transcript of April 16, 2004 Hearing Before the Magistrate Judge

THE COURT: Let me just ask counsel a couple of questions.

Do you argue that there is a danger of prejudice to any of the Defendants if I grant the motion?

MS. EDWARDS: No, Your Honor. The prejudice in this case comes simply from not having finality, but that doesn't rise to the level of some independent prejudice, no.

THE COURT: Do you argue that the length of the delay and its potential impact on judicial proceedings is significant?

MS. EDWARDS: No, Your Honor.

THE COURT: Do you argue whether the filing o this motion was in good faith or not in good faith?

MS. EDWARDS: No, Your Honor.

THE COURT: And I appreciate your candor. In response to that, it does appear then that the only - analysis for the Court under a four-factor determination is the reason for the delay and whether it was within the reasonable control of the movant and essentially comes down to whether it was excusable neglect or not excusable neglect.

MS. EDWARDS: Exactly, Your Honor, and that is the factor that the 4th Circuit in the Thompson case found to be the most important factor.

THE COURT: Yes, yes. Okay.

I think I'm prepared to rule. And I've read all the submissions. This is a judgment call for the Court, and that's what I do for a living as a judge; I make judgment calls.

I'm going to make the judgment call that this was excusable neglect. I'm going to grant the motion. I'm just going to say that there was either a miscommunication, a lack of communication or no communication but when I consider all the circumstances I'm going to find under all the circumstances that it was excusable as it exists right here.

This series of events unfortunately happens in the practice of law. Although twelve and a half years removed, I do recall that these things happen.

Supreme Court, U.S.
FILED
OCT 17 2005
OFFICE OF THE CLERK

No. 05-342

In The Supreme Court of the United States

JAMES J. HAYES, on behalf of himself and all others similarly situated, and THOMAS BOOTS, on behalf of himself and all others similarly situated,

Petitioners,

v.

CROWN CENTRAL LLC, MICHAEL F. DACEY, STANLEY A. HOFFBERGER, BARRY L. MILLER, FRANK B. ROSENBERG, HENRY A. ROSENBERG, JR., JOHN E. WHEELER, JR., JACK AFRICK, HAROLD RIDLEY, CREDIT SUISSE FIRST BOSTON CORPORATION and ROSEMORE, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Question Presented

Whether the Court should review a fact-specific application of the excusable neglect standard set forth in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), in a case where the District Court found that the Petitioners offered no reason for the court to allow their delay in filing a timely notice of appeal and the decision was affirmed by the Court of Appeals for the Fourth Circuit.

Corporate disclosure statements were filed in the United States Court of Appeals for the Fourth Circuit in the Brief for Defendants-Appellees. Subsequent to that filing, Reverend Harold Ridley, S.J., passed away, and a Notice of Death was filed.

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Statement of the Case

On February 9, 2004, the U.S. District Court for the Eastern District of Virginia entered an order dismissing Petitioners' Second Amended Complaint with prejudice. In accordance with the published Local Rules and its long-standing practice with respect to distributing orders, the Clerk's Office mailed the dismissal order to each Virginia counsel of record, but not to out-of-state counsel. (J.A. 66).[1] Petitioners' Virginia counsel received the dismissal order on February 13, 2004. (J.A. 41). According to Virginia counsel, his office had established a "protocol" by which "pleadings and court documents" were forwarded to Petitioners' counsel in Alabama (J.A. 42). The record below is completely silent on:

- what the "protocol" consisted of;
- whether the "protocol" was written or verbal;
- whether the "protocol" had been scrupulously followed in the past;
- why the person(s) responsible for the "protocol" did not follow it on this occasion; and
- what steps Alabama counsel took or did not take to confirm that the "protocol" was being followed.

Notwithstanding the "protocol," Virginia counsel did not mail or otherwise transmit the dismissal order to Alabama counsel due to what Virginia counsel characterizes as "an administrative or clerical error" in his office. (J.A. 42). Virginia counsel did not inform his clients that their case had once again been dismissed, nor did he contact

---

[1] The Joint Appendix filed in the U.S. Court of Appeals for the Fourth Circuit is cited herein as "J.A."

Alabama counsel at any time to advise him of the dismissal order. (J.A. 66).

Before the dismissal order was entered, Petitioners' Virginia counsel had discussed with Alabama counsel their "recommendations regarding the appropriateness of appeal if another adverse decision were issued." (J.A. 42). Following the dismissal, Virginia counsel simply assumed that Alabama counsel's silence reflected "a decision by the client to no longer pursue this matter." (J.A. 42). Even as the deadline for filing a notice of appeal approached, Virginia counsel made no effort to contact his clients or Alabama counsel to confirm that assumption. No Notice of Appeal was filed within the 30-day period of Federal Rule of Appellate Procedure 4(a)(1)(A).

On March 30, 2004, 46 days after Virginia counsel's receipt of the order, Alabama counsel learned of the dismissal. The record does not disclose how Alabama counsel learned of the dismissal order, which had been accessible through the internet since its docketing, or why Alabama counsel did not use the same method to learn earlier that the dismissal order had been entered. Alabama counsel then contacted Virginia counsel. (J.A. 42). On April 5, 2004, Petitioners filed a Motion for Extension of Time to File a Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5)(A). (J.A. 69, 41, 51). On April 16, 2004, the Magistrate Judge granted Petitioners' Motion.

Respondents filed Objections to the Magistrate Judge's Order. The District Court vacated the Magistrate's Order and denied Petitioners' Motion by written opinion on May 25, 2004. In the opinion, the District Court found the following:

> [p]ursuant to the Local Rules, the Clerk's office mailed copies of the Dismissal to Plaintiffs' local counsel. Plaintiffs' local counsel did not inform either Plaintiffs or Plaintiffs' out-of-town counsel about the Dismissal and, as a result, Plaintiffs did not file a timely notice of appeal.

(Petition Appendix at A-7).

The District Court conducted the analysis directed by *Pioneer*. "In considering a motion to extend time to file a notice of appeal, the Court is required to involve itself in an equitable inquiry, taking account of all relevant circumstances surrounding the party's mistake...." (*Id.*). The District Court took into consideration Respondents' concession that three of the four *Pioneer* factors favored Petitioner. (*Id.*). However, after considering the specific facts of the case, the District Court found that "Plaintiffs' reason for filing this motion out of time clearly is not due to excusable neglect.... Simply put, Plaintiffs offer *no reason* for this Court to allow the delay. The only reason offered is that counsel failed to communicate concerning the Dismissal and appeal." (*Id.* at A-8, emphasis added). Accordingly, the District Court vacated the April 16, 2004 Order and denied Petitioners' Motion.

On May 11, 2005, the U.S. Court of Appeals for the Fourth Circuit, in an unpublished *per curiam* opinion, concluded that the District Court "did not abuse its discretion in finding that Appellants failed to demonstrate excusable neglect warranting an extension of the appeal period. Accordingly, we affirm for the reasons stated by the district court." (*Id.* at A-4).

Summary of the Argument

The Petition for Certiorari should be denied because there is no split among the circuit courts of appeals in construing and applying the test established in *Pioneer*. Petitioners mischaracterize the fact intensive decisions of various courts of appeals in applying the four-factor balancing test set forth in *Pioneer* and argue that there is a "sharp conflict" among the circuits where none exists. Respondents respectfully request that the Petition be denied because Petitioners are arguing no more than the misapplication of a properly stated rule of law, which this Court typically declines to review. Supreme Ct. Rule 10.

Reasons for Denying the Petition

In *Pioneer*, this Court clarified the meaning of the term "excusable neglect" in the context of Bankruptcy Rule 9006(b)(1). It is now generally accepted that the *Pioneer* standard applies also to the excusable neglect analysis under Federal Rule of Appellate Procedure 4(a)(5). *See generally Stutson v. United States*, 516 U.S. 193 (1996). This standard is derived from the following pronouncements of this Court:

- In considering whether a party's conduct constitutes excusable neglect, "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Pioneer*, 507 U.S. at 388.

- While excusable neglect is therefore an "elastic concept ... inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Id.* at 392.

- The determination of whether a party's neglect is, in fact, legally excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* at 395.

- The "proper focus is upon whether the neglect of [a movant] and *their counsel* was excusable." *Id.* at 397 (emphasis in original).

Significantly, Petitioners do not argue that *Pioneer* should be overruled or modified. Instead, Petitioners contend that the decision of the Court of Appeals in this case "is part of a clear and deep split among the courts of appeals on how to *apply* the 'excusable neglect' standard to a commonly recurring set of facts." (Petition, at 7) (emphasis added). Petitioners contend further that this alleged circuit split "arises at least in part from uncertainty over how to

interpret conflicting dicta from this Court's *Pioneer* decision." (*Id.*). Arguing that this Court's reasoning in *Pioneer* is inherently contradictory, Petitioners seek "[c]larification" of that decision. (*Id.*).

In support of their request for "clarification," Petitioners have cherry-picked a handful of fact-specific court of appeals decisions and arbitrarily placed each decision into one of two categories. The first category is comprised of several circuits that Petitioners contend have applied the *Pioneer* standard to hold that attorney negligence is excusable *per se*, so long as the district court finds no prejudice, no delay and no bad faith. (*Id.* at 9-13.) The other category is comprised of circuits that Petitioners contend have applied *Pioneer* to hold that attorney negligence is *never* excusable even if the district court finds no prejudice, no delay and no bad faith. (*Id.* at 13-14). Petitioners ask this Court to "clarify" that an attorney's neglect is excused whenever there is no prejudice, no delay and no bad faith.

Petitioners' request for clarification should be rejected and the Petition denied because (a) the "circuit split" proffered is wholly illusory; (b) the District Court properly applied the *Pioneer* standard to the particular facts and circumstances of this case; and (c) public policy considerations favor rejection of the *per se* rule advocated by Petitioners.

A. The Circuit Split Proffered by Petitioners Is Wholly Illusory.

1. No Circuit Court of Appeals Has Held that *Pioneer* Requires Attorney Neglect To Be Found Excusable if There Is No Prejudice, No Delay and No Bad Faith.

According to the Petition, certain circuits hold that an "attorney's neglect is excusable if there is no prejudice, no delay, and no bad faith." (Petition, at 9). This proposition is simply false.

To demonstrate the alleged "circuit split," Petitioners rely heavily on language from the Ninth Circuit's decision in *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004). That case, however, refutes the existence of a circuit split. In *Pincay*, an attorney at a "sophisticated law firm" with a "sophisticated system to determine and calendar filing deadlines" delegated responsibility for filing a notice of appeal to a paralegal. The paralegal believed the Federal Rules allowed for 60 days to file the notice, when the rule clearly states 30 days. *Id.* at 854-55.

The district court *granted* the motion to extend the filing deadline, but a panel of the Ninth Circuit reversed, holding that delegation of this duty to a paralegal was per se inexcusable. The Ninth Circuit sitting *en banc* subsequently reversed, holding that delegation to a paralegal is not *per se* inexcusable. *Id.* at 855.

More significantly to the instant case, the Ninth Circuit, in considering the larger question of the paralegal's misreading of the Federal Rules, held that the district court

had not abused its discretion in granting the extension of time. *Id.* at 860. In so holding, however, the court stated that the

> decision to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the district court because the district court is in a better position than we are to evaluate factors such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers..., and the likelihood of injustice if the appeal was not allowed. *Had the district court declined to permit the filing of the notice, we would be hard pressed to find any rationale requiring us to reverse.*

Id. at 859 (emphasis added). Accordingly, the Ninth Circuit interprets *Pioneer* to grant a district court wide latitude in applying the four-factor test to the particular facts and circumstances of a case. While the Ninth Circuit did state in dicta that "[t]he authorities interpreting *Pioneer* in a number of circuits are in some disarray," *id.* at 857, the exercise of discretion by the lower courts to reach different results under fact-specific applications of the *Pioneer* standard is no justification for granting the Petition in this case, particularly when the Ninth Circuit's decision is consistent with the Fourth Circuit's affording the District Court wide latitude in determining whether neglect is excusable. This kind of latitude is commonly afforded to district courts applying the *Pioneer* standard. *See United States v. Brown*, 133 F.3d 993, 997 (7th Cir. 1998) (stating that "[i]n a close case like this one, [where the attorney confused Wisconsin state rules of

procedure with the federal rules] we might affirm a district court that refused to exercise lenity").

Moreover, *Pincay* certainly does not stand for the proposition that attorney negligence should always be excused if there is no delay, no prejudice and no bad faith. Accordingly, nothing in *Pincay* indicates a "split" with the Fourth Circuit's decision in this case.

The fatal flaws in Petitioners' argument are also demonstrated by cases from other circuits. For example, Petitioners rely on *Robb v. Norfolk & W. Ry. Co.*, 122 F.3d 354 (7th Cir. 1997). In that case, after failing to notify the court of an agreement with opposing counsel to extend the time to file a response to a summary judgment motion, the movant sought relief under Fed. R. Civ. P. 60(b)(1) on the basis of excusable neglect. *Id.* at 356. The district court denied the motion, holding that attorney negligence can never be excusable. *Id.* at 357. The Seventh Circuit *reversed*, holding only that the district court possessed such discretion. *Id.* at 361 Significantly, the court of appeals noted that its decision was consonant with *Pioneer* and other cases interpreting it, including those decided by the Fourth Circuit. *Id.* at 362 (citing *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530 (4th Cir. 1996)). Evidently, the Seventh Circuit does not see a conflict with the Fourth Circuit.

As further evidence of the flaws in Petitioners' argument, Respondents note the Seventh Circuit's decision in *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132 (7th Cir. 1996). In that case, an attorney missed several deadlines and argued that, having been retained late in the case, he did not have sufficient time to meet the deadlines. The attorney also argued that he believed (erroneously) that the deadline

for filing the notice of appeal was tolled while the district court considered a motion to alter or amend the judgment. The attorney was also unaware that the 10-day deadline under Fed. R. Civ. P. 59(e) cannot be extended. *Id.* at 133. In rejecting the claim of excusable neglect, the Seventh Circuit stated, "[h]ere the rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused, but inexplicable. If there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect." *Id.* at 134.

Thus, in *Prizevoits*, the Seventh Circuit rejected an excusable neglect claim because the "reason for the delay" – the attorney's negligence – was simply inexcusable. Obviously, this decision does not conflict with *Robb* or the Fourth Circuit's decision in this case. To be sure, this Court's admonition that the concept of excusable neglect be treated as an "elastic concept" can, will and should result in courts reaching different conclusions under different sets of facts. This is demonstrated by other circuits that have found attorney neglect to be excusable in some cases and inexcusable in others. *Compare Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996) (finding excusable neglect where associate attorney asked his secretary to notify lead counsel of an impending deadline and secretary failed to do so), *with Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996 (11th Cir. 1997) (refusing to find excusable neglect when an attorney misread the time limit to file a motion for a new trial under Federal Rule of Civil Procedure 59).

2. No Circuit Court of Appeals Has Held that *Pioneer* Requires Attorney Neglect To Be Found Inexcusable Even if There Is No Prejudice, No Delay and No Bad Faith.

None of the cases cited by Petitioners as representing the "hard line" side of the circuit split apply the *per se* rule articulated in the Petition. In each of these cases, courts considered the *Pioneer* standard and four-factor test, and based on the facts and circumstances of the particular case, held that the reason for the delay was inexcusable. Nothing in *Pioneer* precludes such a finding. These cases include:

- *Graphic Comm'ns Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1 (1st Cir. 2001) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney mailed notice of appeal to co-counsel at the wrong address and where co-counsel still had sufficient time to file the notice of appeal in a timely fashion and failed to do so).

- *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2d Cir. 2003) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney relied on the representation of *opposing* counsel as the sole means of ascertaining the date on which the notice of appeal was due to be filed).

- *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530 (4th Cir. 1996) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney entrusted the filing of the notice of appeal to the vagaries of the U.S. Post Office, knowing that notices must be filed (not mailed) by the deadline in Rule 4).

- *McCurry v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586 (6th Cir. 2002) (declining to grant a Rule 60(b) motion where attorney made a "purely strategic, wholly deliberate decision" to name what turned out to be the wrong party in a wrongful death action under Tennessee law; citing *Pioneer* for the proposition that "clients must be held accountable for the acts and omissions of their attorneys").

- *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457 (8th Cir. 2000) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney did not comprehend how to count weekends in determining the deadline for filing a notice of appeal).

- *United States v. Torres*, 372 F.3d 1159 (10th Cir. 2004) (considering the *Pioneer* standard and refusing to find attorney's neglect excusable where attorney in a criminal case confused the deadline for filing notices of appeal in criminal cases

> with the deadline for filing notices of appeal in civil cases).

In a futile attempt to bolster their contention that there is a circuit split, Petitioners categorize the Fourth Circuit's decision in *Thompson* as putting that court into a neat bucket of circuit courts of appeals that take a "hard line approach that an attorney's neglect is never excusable." (Petition, at 6). This contention is belied by the Petitioners' own brief in the court below, where they stated:

> However, contrary to the Chief Judge's decision, this Court [the Fourth Circuit] did not revive the pre-*Pioneer* standard that precluded relief if the reason for the delay was within the late filer's control and not extraordinary. *Thompson simply holds that repeating the same error that leads to a late filing is not excusable the second time around.*

Brief for Plaintiffs-Appellants, filed September 21, 2004 (emphasis added).

Contrary to Petitioners' strained characterizations, these cases stand for the common sense proposition that "there still must be a satisfactory explanation for the late filing." *Graphic Comm'ns*, 270 F.3d at 5; *accord Pioneer*, 507 U.S. at 395 (noting that attorney's "neglect" must also be "excusable"). No case holds that attorney neglect is never excusable under any circumstance.

In the absence of any discernible circuit split, the Petition must be viewed for what it really is: a thinly-veiled attempt to have this Court review the lower courts' decisions

based upon Petitioners' belief that certain courts, including the lower courts in this case, have *misapplied* Pioneer. Petitioners admit as much when they argue that this dispute concerns "how to *apply* the 'excusable neglect' standard." (Petition, at 8) (emphasis added).

The Rules of this Court could not be clearer on this point. "A petition for a writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law." *See* Supreme Court Rule 10. This is particularly true in this case where Petitioners are asking the Court to review the fact-bound, case-specific holding of the District Court and Court of Appeals that the conduct of Petitioners' counsel was inexcusable under the circumstances.

Anticipating such an argument, Petitioners posit that the Fourth Circuit (and others adopting the so called "hard-line" *per se* rule) did not misapply *Pioneer*. (Petition, at 15). Instead, Petitioners assert that these courts are simply confused by the "conflicting dicta" in *Pioneer*, making this "a case requiring clarification of an earlier decision and ... not a case of the misapplication of a properly stated rule of law." (*Id.*). This is a red herring. As demonstrated above, the "clarification" that Petitioners seek is really a request for this Court to declare that *Pioneer* requires a district court to find all attorney neglect excusable so long as there is no delay, no prejudice and no bad faith. This is not a clarification. It would be an overruling of *Pioneer* and a wholesale revision of its standards.

Petitioners also argue that their proffered circuit split "cannot be swept away as the natural consequence of applying a multi-factored balancing test to varying sets of

facts." (Petition, at 6). To the contrary, the diverse opinions of the circuit courts are the inevitable result of *Pioneer*, in which this Court eschewed bright-line, *per se* rules and left to the discretion of the district courts the latitude to extend certain deadlines based upon the facts and circumstances of a particular case. Petitioners have offered the Court no good reason to turn back the clock on its excusable neglect jurisprudence and especially so in the context of an uncontested factual record which despite Petitioners' characterization does not present "a commonly recurring set of facts." (Petition, at 7).

B. The Court of Appeals and District Court Properly Applied the *Pioneer* Standard to the Particular Facts and Circumstances of This Case.

In this case, Petitioners' Virginia counsel received an order from the District Court dismissing his client's case with prejudice. Virginia counsel did not inform his clients of the order, nor did he consult with his co-counsel in Alabama. He let pass the deadline to notice an appeal, which is unambiguous, not to mention "mandatory and jurisdictional." *See Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). Furthermore, while the record does not disclose why, Petitioners' Alabama counsel made no inquiries about the status of the case until at least 46 days after the order had been entered and months after the oral argument. In other words, Petitioners' counsel had *no excuse* for the late filing and the District Court found accordingly.

Thus, it was perfectly reasonable and within the discretion of the District Court to conclude, as it did, that the

lack of any "reason for the delay" outweighed the fact that the other *Pioneer* factors favored Petitioners. There is no language in *Pioneer* that suggests this result was improper. For this reason, the Petition for Certiorari should be denied.

C. Strong Public Policy Considerations and the Effective Administration of Justice Favor Rejection of the *Per Se* Rule Advocated by Petitioners.

Petitioners should not be awarded certiorari so they can argue to this Court that all attorney neglect must be treated as excusable if there is no delay, no prejudice and no bad faith. Petitioners offered such a scant record below of their procedures, conduct, and "protocol," together with a complete absence of extenuating circumstances, that only such a *per se* rule would justify reversal of the Court of Appeals in this case. The adoption of such a rule, which at bottom is the only way in which Petitioners could revive their lawsuit, would be tantamount to engrafting an automatic 30-day extension to the time limit in Rule 4(a)(1)(A). Under such a scenario, "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced." *Silivanch*, 333 F.3d at 368. The rule that Petitioners propose is simply a bad idea, devoid of logic and fraught with peril for lawyers and judges alike. It should be rejected.

Conclusion

For the foregoing reasons, Respondents respectfully request that the Petition for Certiorari be denied.

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OCT 26 2005

No. 05-342

In the
Supreme Court of the United States

JAMES J. HAYES, on behalf of himself and all others similarly situated, and THOMAS BOOTS, on behalf of himself and all others similarly situated,

Petitioners,

- v. -

CROWN CENTRAL LLC, MICHAEL F. DACEY, STANLEY A. HOFFBERGER, BARRY L. MILLER, FRANK B. ROSENBERG, HENRY A. ROSENBERG, JR., JOHN E. WHEELER, JR., JACK AFRICK, HAROLD RIDLEY, CREDIT SUISSE FIRST BOSTON CORPORATION and ROSEMORE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1. The Second Circuit acknowledges the conflict in the Circuits

In the recently decided case of In re Enron Corp., 419 F.3d 115 (2d Cir. 8-16-05), the Second Circuit said it had "taken a hard line" on Pioneer Investments v. Brunswick, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), and acknowledged the conflict between it and the Ninth Circuit decision in Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004). The Second Circuit said:

> But see Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004) (en banc) (applying flexible reading of Pioneer and affirming trial court's decision to allow late-filed notice of appeal based on excusable neglect consisting of paralegal's misreading of the rule governing the deadlines for appeal), cert. denied, __ U.S. __, 125 S. Ct. 1726, 161 L. Ed. 2d 602 (2005); In re 50-Off Stores, Inc., 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998) (noting that in conducting the Pioneer analysis, "[n]o single circumstance controls, nor is a court to simply proceed down a checklist ticking off traits. Instead, courts are to look for a synergy of several factors that conspire to push the analysis one way or the other"); In re Sacred Heart Hosp. of Norristown, 186 B.R. 891, 895 (Bankr. E.D. Pa. 1995) ("[A] long and logically unjustified delay which nevertheless has no significant impact on the debtor's case should . . . often be deemed excusable.").

419 F.3d at 124.

There is a clear and distinct conflict between those circuits that have adopted a hard line in applying the Pioneer test and those circuits which give effect to the equitable concepts of no prejudice, no delay and no bad faith. Compare Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 368 (2d Cir. 2003), cert. denied sub nom Essef

Corp. v. Silivanch, 540 U.S. 1105, 124 S. Ct. 1047, 157 L. Ed. 2d 890 (2004), with the Third Circuit decision in George Harms Constr. Co., Inc. v. Chao, 371 F.3d 156, 164 (3d Cir. 2004), and the Eleventh Circuit decision in Cheney v. Anchor Glass Container Corporation, 71 F.3d 848, 850 (11th Cir. 1996).

Contrary to the respondents' brief at page 7, the Third and Eleventh Circuits have held that Pioneer requires attorney neglect to be excused if there is no prejudice, no delay and no bad faith. George Harms Constr. Co., Inc., supra; Cheney v. Anchor Glass Container Corp., supra. Contrary to the respondents' brief at page 11, the Second and Tenth Circuits have held that Pioneer requires that attorney neglect be held not excusable even if there is no prejudice, no delay and no bad faith. Silivanch v. Celebrity Cruises, Inc., supra; U.S. v. Torres, 372 F.3d 1159 (10th Cir. 2004).

Nowhere in their opposition brief do the respondents acknowledge or deal with the statement in Pioneer that:

> . . . the lack of any prejudice to the debtor or to the interests of efficient judicial administration combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.

507 U.S. at 397-8, 123 L. Ed. 2d at 91. In the instant case, the Magistrate Judge established that there was no prejudice, no delay in the proceedings and no bad faith, and granted the motion to extend the time to file the notice of appeal. In overruling the Magistrate Judge, the Chief Judge said these factors had no significance (Pet. App. A-7), and the Court of Appeals upheld the Chief Judge in holding that these factors had no significance.

2. Neglect is neglect, and there is no rational way to distinguish between different types of attorney neglect.

The respondents argue at page 10 of their brief that excusable neglect is an elastic concept which may result in the same circuit finding attorney neglect to be excusable in some cases

and not in others. The respondents contend that it is appropriate for a court to hold that one type of attorney neglect is excusable and another type of attorney neglect is not excusable. That is not a rational or reasonable application of the concept of excusable neglect. Neglect is neglect and should be excusable if it is harmless, and should not be excusable if it causes prejudice or delay or constitutes bad faith. The huge volume of litigation involving excusable neglect would be greatly reduced if differences in types of neglect were ignored, and the only issues are whether there is prejudice, delay or bad faith. A district court may exercise its discretion in analyzing those equitable concepts.

Respondents argue at page 10 of their brief that the concept of excusable neglect "can, will and should" result in different results under different sets of fact. Misreading a procedural rule, miscalculating the applicable number of days or miscommunication among attorneys are to be treated differently, according to respondents. It is highly doubtful that Pioneer supports such a concept of excusable neglect, but if it does, Pioneer should be clarified. An attorney's good faith, harmless mistake should be excused whether the mistake is misreading a rule, miscalculating periods of time or failing to communicate among attorneys.

3. The conflict between those circuits which give effect to the Pioneer equitable factors and those circuits that do not should be resolved.

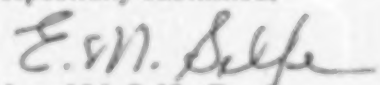
The respondents argue at page 11-12 of their brief that the hard line circuits consider all four factors of the Pioneer test. In fact, these circuits do not and are only concerned with the reason for the late filing. If that reason is attorney neglect, it is not excusable. See the extensive discussion of this issue by the Second Circuit in Enron, 419 F.3d at 122-3. The hard line circuits are offended by attorney neglect and will not consider the equitable factors of no prejudice, no delay and no bad faith. The no harm – no fault circuits acknowledge that mistakes are made and do give effect to the equitable factors of no prejudice, no delay and no bad faith. This conflict in the circuits will not be resolved by further litigation in the lower courts, and it should be resolved

by this Court. For the reasons stated in the petition, the record in this case permits the Court to do so.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,



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ARGUMENT

Respondents' harmless error in filing their brief in opposition with a qualified affidavit of mailing illustrates excusable neglect.

Respondents' brief in opposition was required to be filed no later than October 17, 2005. On that date Lantagne Legal Printing, Inc. of Richmond, Virginia, as respondents' agent, filed the brief in opposition by depositing it in the United States Postal Service. Because the envelope in which the brief was mailed contained only a commercial postage meter label, Lantagne Legal Printing, Inc. filed an affidavit that the brief in opposition was deposited in the United States Postal Service on October 17, 2005. Appendix hereto. That affidavit was qualified and stated that the statement tnat the brief in opposition was mailed on October 17, 2005, was "true and exact to the best of my knowledge and belief." (Emphasis added).

Such an affidavit does not comply with this Court's Rule 29 which provides in paragraph 2 that . . . "If the postmark is missing or not legible, the Clerk will require the person who mailed the document to submit a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the details of the mailing and stating that the mailing took place on a particular date within the permitted time."

An affidavit that contains the qualification that the affidavit is true and exact to the best of the knowledge and belief of the affiant does not comply with Rule 29. The affidavit must be unqualified. See, e.g., 28 U.S.C. § 1746 which provides that a declaration must state:

> I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.

The brief in opposition undoubtedly was deposited in the mail on October 17, 2005 because petitioners' counsel received their copies of the brief in Birmingham, Alabama on October 19, 2005. The submission of the qualified affidavit was harmless error

made in good faith by the respondents' agent, and the Clerk of this Court quite properly treated the brief in opposition as having been filed on October 17, 2005.

The Lantagne affidavit also was intended to constitute proof of service pursuant to paragraph 5 of Rule 29. The affidavit did not comply with subparagraph 5(c) of Rule 29 which requires that the notarized statement of service be unqualified. Again, this was a harmless error.

Harmless error in the district court is governed by Rule 61 of the Rules of Civil Procedure which states that:

> . . . The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Harmless error in the courts of appeal and in this Court is subject to 28 U.S.C. § 2111 which states:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Section 2111 of 28 U.S.C. and F.R.C.P. Rule 61 clearly require that an error by the court or by any party is to be ignored if it does not prejudice or affect the substantial rights of a party. Similarly, an attorney's neglect which (i) does not prejudice anyone, (ii) does not delay the judicial proceedings and (iii) does not show bad faith should be considered excusable neglect. The hard line concept of excusable neglect followed by six circuits should be rejected in favor of the flexible concept followed by five circuits..

CONCLUSION

For the reasons stated in the petition, the reply brief and this supplemental brief, the petition should be granted.

Respectfully submitted,

E. M. Selfe

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APPENDIX

No. 05-342

JAMES J. HAYES, on behalf of himself and all others similarly situated,
and THOMAS BOOTS, on behalf of himself and all others similarly situated,
Petitioners,

v.

CROWN CENTRAL LLC, MICHAEL F. DACEY, STANLEY A HOFFBERGER, BARRY L. MILLER, FRANK B. ROSENBERG, HENRY A. ROSENBERG, JR., JOHN E. WHEELER, JR., JACK AFRICK, HAROLD RIDLEY, CREDIT SUISSE FIRST BOSTON CORPORATION and ROSEMORE, INC.,
Respondents.

AFFIDAVIT

I, Richard Markell, of Lantagne Legal Printing, Inc., attest that the following statement is true and exact to the best of my knowledge and belief:

On this 17th day of October, 2005, I, Richard Markell, hereby certify that the attached Brief in Opposition to Petition for Writ of Certiorari was delivered, via United States Postal Service, First Class, Certified Mail, to the Supreme Court of the United States. I further certify that I have served by mail this same date the required copies to the parties listed below:

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COMMONWEALTH OF VIRGINIA)
CITY OF RICHMOND) to-wit:

Richard Markell appeared before me this 17th day of October , 2005, and attested that the foregoing affidavit is true and exact to the best of his knowledge and belief.

My commission expires: 07/31/06

Anthony G. Lantagne, Notary Public